United States Court of Appeals

for the Second Circuit

APPENDIX

77-4070

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARCELLO JOAQUIN CASTRO-CACERES,

Petitioner,

Docket No.77-4070

- against -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

PETITION TO REVIEW A
FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEALS

APPENDIX OF PETITIONER

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UNITED STATES COURT OF APPEALS
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

JAN 25 1977

File: A21 086 164 - New York City

In re: JOAQUIN MARCELO CASTRO-CACERES

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Edward L. Dubroff, Esquire
Barst & Mukamal
127 John Street
New York, New York 10038

ON BEHALF OF I&N SERVICE: Mary Jo Grotenrath
Appellate Trial Attorney

ORAL ARGUMENT: December 6, 1976

CHARGE:

ORDER: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Nonimmigrant crewman-remained longer than permitted

APPLICATION: Withholding of deportation

This case presents an appeal from a decision of the immigration judge on July 19, 1976, finding the respondent deportable and granting him the privilege of voluntary departure, with an alternate order of deportation to Chile. The immigration judge denied the respondent's application for withholding of deportation, pursuant to the provisions of section 243(h) of the Immigration and Nationality Act, as amended. The appeal will be dismissed.

The respondent is a native and citizen of Chile, who was admitted to the United States on July 9, 1969, as a nonimmigrant crewman authorized to remain here for a period

of time not to exceed 29 days. He was not apprehended by the Service until May 11, 1976. The respondent is still in this country. Deportability has been established by clear, convincing and unequivocal evidence.

The immigration judge noted that the respondent had been a member of and worked for the Liberal Party while living in Chile. The immigration judge found the respondent's testimony inconsistent as to the length of time he had given speeches against the Chilean Government prior to his departure in July 1969. Further finding that the respondent's fear of persecution if deported to Chile was based solely on speculation, the immigration judge denied his application for withholding of deportation.

Upon review of the record, including the contentions of counsel at oral argument, we are satisfied that the decision of the immigration judge was correct. The respondent's wife, three children, father and sister still reside in Chile and apparently have not been subject to any persecution. The respondent claimed that, "I'm the only one with political ideas in the family." (Tr. p. 20). Although he initially admitted membership in the Communist Party (Ex. 3), less than two months later the respondent stated in an affidavit that "I was never a member of, a supporter of, or associated with the Communist Party."

We find that the respondent has failed to show a well-founded fear that his life or freedom would be threatened in Chile on account of his race, religion, nationality, membership in a particular social group or political opinion. See Matter of Dunar, Interim Decision 2192 (BIA 1973). We conclude that the respondent would not be persecuted if deported to Chile. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 31 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A21 086 164
A16 011 324 - New York

July 19, 1976

In the Matter of)

JOAQUIN MARCELO CASTRO CACERES) IN DEPORTATION PROCEEDINGS

-Respondent-)

CHARGE: I&N Act, Section 241(a)(2) - admitted as a crewman, remained beyond

APPLICATION: I&N Act, Section 243(h) - temporary withholding of deportation to Chile; in the alternative, voluntary departure

IN BEHALF OF RESPONDENT

Barst & Mukamal, Esq.
127 John Street
New York, N.Y. 10038

IN BEHALF OF SERVICE

Sabri Kandah, Esq.
Trial Attorney
New York, N.Y. 10007

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 29 year old married male alien, a native and citizen of Chile, who last arrived in the United States at New York on July 9, 1969. At that time he was admitted as a nonimmigrant crewman authorized to remain in the United States not to exceed 29 days. He remained in the United States beyond that time.

It indicates in his passport that he was admitted as a C-1 to join a ship. Through his attorney he has admitted that he is deportable from the United States on the charge contained in the Order to Show Cause.

The record established that at the time of his arrival he was in possession

of a valid Chilean passport which contained a C-1 type transit visa, which was issued in Chile and also a D visa which was issued in Chile. It appears that he did enter the United States as a crewman.

The respondent has applied for the privilege of voluntary departure from the United States in lieu of deportation. He has also testified that if he was to be granted voluntary departure he would depart the United States at his own expense but he has refused to designate a country in case deportation should become necessary. He has stated that if he be directed to be deported to Chile he could not return to Chile, the country of his citizenship, because he would be persecuted. He thereupon submitted an application for temporary withholding of deportation under Section 243(h) of the Immigration and Nationality Act, claiming that his deportation to that country would result in persecution. He has asserted that his claim for political asylum from Chile is based upon the fact that while he was in Chile he spoke out against the government in the form of giving speeches on corners and also at different rallies. In his affidavit he stated that between 1966 and 1968 he spoke at an average of once a week. In his testimony in front of me, he stated that he only spoke approximately one year. There is inconsistency in his testimony as to the length of time he gave these speeches. Nevertheless, he has submitted no other evidence whatsoever to sustain his claim for political asylum other than the fact that if he was to return to Chile he would be thrown in jail and possibly persecuted and killed because of these speeches he made.

He further testified that he is married and his wife is presently living in Chile. He has three children, ages 10, 9 and 7, who are living in Chile and

a father and a sister who are living in Chile. He testified that neither his father, nor his sister, nor his children are being persecuted in Chile and the reason why they are not being persecuted is because they are not politically minded. He further testified that his wife in Chile has left his children with his father and he does not know her whereabouts and that his father, at the present time, is caring for the children and supporting these children. He in no way is helping for their support because his father has taken on this burden. The respondent further testified that he is presently living with a female who he is not married to, and has two children born of this adulterous relationship, both born in the United States. He is presently seeking to divorce his wife in Chile and marry this female who he is living with.

The Service presented to the Office of Refugee and Migration Affairs, on May 14, 1976, the claim of political asylum and they did not receive any reply and therefore denied his application for political asylum in the United States. Nevertheless, I am not in any way basing my decision on the information submitted to the Bureau of Refugee and Migration and I am only basing my decision on the evidence before me.

Under 8 CFR 242.17(c) the respondent is charged with the burden of establishing that he would be subject to persecution if he was deported to Chile. After carefully analysing all the evidence of the record I find that the respondent has failed to satisfy this requirement. The Court, in Cheng Fai Fu v. INS, 386 F.2d 750 2nd Cir. 1967 cert. denied 390 US 1003, stated that the respondent must show that he would be singled out as an individual by the governmental authority and suffered persecution therefrom in order to

establish a clear probability of persecution. This the respondent has not done. The respondent's claim is solely on speculation that he would be persecuted if he returned to Chile because of these alleged speeches he had made in Chile. I will therefore deny his application for withholding of deportation under Section 243(h).

He has requested that he be granted voluntary departure. He has never been arrested. There is a question if he has ever been a member of the Communist Party. The Service has alleged that on his application for political asylum he stated he was a member of the Communist Party in question 20. Other than the statement on the application, no evidence has been submitted to me that he has been a member of the Communist Party. The respondent has denied that he has been a member of the Communist Party. I will assume that he has never been a member of the Communist Party. Although he is living in an adulterous relationship with a female, and has two children born of this relationship, no evidence has been submitted to me that this relationship disturbed his viable marriage back in Chile, or the marriage in Chile in any way was viable. I will therefore grant him voluntary departure.

ORDER: IT IS ORDERED that the respondent's application for withholding of deportation to Chile under Section 243(h) of the Immigration and Nationality Act as amended be denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation respondent be granted the privilege of voluntary departure, without expense to the government, on or before August 19, 1976 or any extension beyond such date as may be granted by the district director and under such terms and conditions

as the district director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to Chile on the charge contained in the Order to Show Cause.

Anthony M. DeGaeto
Immigration Judge

Q Now, going back to the original question, do you have any brothers or sisters or parents living in Chile now?

A Yes, my father lives in Chile. And my oldest sister.

Q Any members of your family, have they ever been subjected to any persecution by the Chilean government in Chile?

A I'm the only one with political ideas in the family.

Q If you are following the politics of your country Chile, there was a time when the country was ruled by a leftist regime. Is that true?

A Yes.

Q Why didn't you, at that time, go back to Chile?

A Because the ruling party at that time I did not agree with and I was here in this country.

Q Now, you said that you were a member of the Liberal Party in Chile.

A Yes sir.

Q But in your testimony today you said you worked for the Liberal Party. Is there a difference between a member of the party and worked for the party?

A Now I understand the question.

IMMIGRATION JUDGE: Wait a moment.

OFF THE RECORD ON THE RECORD

A I am not a registered member of the Party. I was paid by the Party for the speeches I made.

Q Where did you make those speeches?

A In Valparaiso, Chile.

Q And how many speeches did you make?

A I do not remember. There were many of them.

Q And what did you say, in general, in those speeches?

A My job was to move the masses and obtain votes for the party.

Q And was the party in agreement with the regime, the ruling regime in Chile at that time, or against it?

A Before an election, all parties are against the government.

Q Were you arrested at that time because of those speeches?

A No.

IMMIGRATION JUDGE: TO RESPONDENT

Q When were you born?

A 1947. January 16. January 16, 1947.

Q And when did you start making these speeches in Chile?

A I started to make some money with the Liberal Party when I was 20, 21.

Q And how old were you when you left Chile?

A 22.

Q So you made these speeches for approximately less than a year?

A About two years.

Q If you were 21 when you started making the speeches and you left when you were 22 I would assume it's only one year.

A I cannot tell you exactly because at the time I was preoccupied by the time.

IMMIGRATION JUDGE: Mr. Kandah, you may continue.

MR. KANDAH TO RESPONDENT

Q Did you write any articles when you were in Chile opposing the government of Chile at that time?

A I used to read all the speeches and articles made by the Secretary of the Party.

Q What does the Party stand for? What does the Liberal Party stand for?

MR. SINGER: I object.

IMMIGRATION JUDGE: Wait Mr..on what grounds?

MR. SINGER: On the grounds that the question is not clear. What does the Party stand for now, or what did the party stand for then?

MR. KANDAH: At that time when he was there and now, if it's still in existence.

RESPONDENT

A It was a Party inclined to the right, without Communist ideas.

IMMIGRATION JUDGE TO RESPONDENT

Q Who was in charge of the Party when you were in it? Who was in charge of the government?

A Senator Pedro Evannia (Phonetic).

Q He was the President of the country?

A No, senator.

Q Who was the President of the country?

A Eduardo Frae (phonetic).

Q Who is the President of the country now?

A It's a military board now, with Penoche (phonetic).

IMMIGRATION JUDGE: You may continue Mr. Kandah.

MR. KANDAH TO RESPONDENT

Q Do you know of any leading member of the Party who is now part of the Chilean government, is a Senator or congressman?

A None of the members of the liberal parties have any positions in the government today. Only military.

Q How many leading members of the party, if you keep yourself up to date on

what's going on in Chile, how many leading members of the Party are in jail or persecuted or killed, or anything happen to them by the present regime, to the best of your knowledge?

A Not only from the Liberal Party, but from all parties they disappear. The military do not give any information of the disappearance or their acts.

Q So, before you left Chile to come to the United States in '69, your association with this Party was for about six months, is that correct?

A No, about two years.

Q What, do you have any correspondence from any members of your family or friends that if you return to Chile you will be subject to persecution because of your membership or assocation with the Liberal Party?

A The only correspondence I maintain with Chile is with my father and he tells me that alot of my friends and alot of people and members of different parties, they are hunted, persecuted and disappear, but those letters I destroyed.

Q What happened to the Liberal Party, is it in existence in Chile, or it want out of the political picture?

A All parties have disappeared.

Q How about during...

MR. KANDAH: Excuse me your Honor. Off the record.

OFF THE RECORD ON THE RECORD

MR. KANDAH: TO RESPONDENT

Q What happened to the party during ALlende's regime?

A The Liberal Party continued to exist, against the government.

Q Against which government?

A It was not in accord with the Communist government of Allende.

MR. KANDAH: No further questions your Honor.

IMMIGRATION JUDGE: Off the record.

OFF THE RECORD ON THE RECORD

MR. SINGER TO RESPONDENT

Q Mr. Castro, do you have any children born here in the United States?

A Two, one five years old and the other one three.

Q Do you live with their mother?

A We've been living, I've lived with the mother for six years.

Q Have you ever attempted to get a divorce from your wife in Chile before this time?

A Yes, I have proof.

IMMIGRATION JUDGE TO RESPONDENT

Q Is the woman you're living with now married or ever been married?

A No.

MR. SINGER TO RESPONDENT

Q Do you support the mother of the children and your children?

IMMIGRATION JUDGE: Which children are we talking about?

Q Do you support the woman that you are living with, do you support your children who were born in the United States and their mother?

A From the first day they were born.

IMMIGRATION JUDGE TO RESPONDENT

Q Do you support your children in Chile?

A My father is doing that in Chile.

Q I asked you, do you support them?

A I do not.

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

MARCELLO CASTRO, being duly sworn, deposes and says:

I make this affidavit in support of my application for political asylum in the United States.

I arrived in the United States on July 9, 1969. Prior to my arrival in the United States from Chile I was a member of and working for the Liberal Party. I was a speech maker and I addressed many street rallys. Between 1966 and 1968 I spoke on the average of once a week. I worked directly under Senator Pedro Ibanez. Since the advent of the military government in Chile all leaders of the Liberal Party and other political partys have been persecuted, jailed and some intentionally killed. The whereabouts of Senator Pedro Ibanez are presently unknown and it is assumed that he fled the country. One of the people with whom I worked, a Mr. Ibar, and certain other members of the Liberal Party have been imprisoned by the military government. Many political figures have been put in concentration camps merely because of their political associations.

At the time I was caught by the Immigration Service I was interviewed by a Mr. Kampel in English. At that time I gave him a statement regarding my political activities. After giving him the statement he told me to sign it without reading the statement or having it read to me.

I hereby state under oath that I was never a member of, a supporter of, or assoicated with the communist party.

MARCELLO CASTRO

Sworn to before me this
6th day of July, 1976

NOTARY PUBLIC